TEO JYR JONG & ANOR

v.

ASSET FIRST SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCvC-1222-12-2011]
26 JUNE 2013

LEGAL PROFESSION: *Duty of care - Negligence - Solicitors - Sale and purchase of property - Whether there was a breach of duty of care and responsibilities - Whether there was a contract of appointment between plaintiffs and solicitor - Presumed or implied retainer - Whether existed - Whether solicitor negligent in the exercise of its professional duties - Whether there was contributory negligence by plaintiffs - Whether liability of solicitor in relation to plaintiffs' claim reduced*

CONTRACT: *Sale and purchase of property - Solicitor - Duty of care - Negligence - Whether there was a breach of duty of care and responsibilities - Whether there was a contract of appointment between plaintiffs and solicitor - Presumed or implied retainer - Whether existed - Whether solicitor negligent in the exercise of its professional duties - Whether there was contributory negligence by plaintiffs - Whether liability of solicitor in relation to plaintiffs' claim reduced*

LAND LAW: *Sale and purchase of property - Solicitor - Duty of care - Negligence - Whether there was a breach of duty of care and responsibilities - Whether there was a contract of appointment between plaintiffs and solicitor - Presumed or implied retainer - Whether existed - Whether solicitor negligent in the exercise of its professional duties - Whether there was contributory negligence by plaintiffs - Whether liability of solicitor in relation to plaintiffs' claim reduced*

The first plaintiff executed an agreement ('the asset agreement') with the first defendant where, upon payment of an administrative fee, the first defendant was to render services ('the services') to the first plaintiff for purchase, re-sale or rental of properties. The plaintiffs alleged that the second defendant was appointed as their solicitor in the conduct of the transactions regarding two properties ('the properties') which they had purchased. The plaintiffs had paid a total price of RM268,700 which was kept in the second defendant's client's account for the properties, and

total legal fees and disbursements of RM4,809.54 to the second defendant. Subsequently, the plaintiffs discovered that the properties did not belong to the purported vendors. The plaintiffs thus claimed against the first and second defendants, *inter alia*, for the said sum of RM268,700 and the refund of legal fees and disbursements from the second defendant. Judgment in default was obtained by the plaintiffs against the first defendant. The plaintiffs were now suing the second defendant for loss and damage suffered by reason of the breach of his duties and responsibilities as their solicitor. The issues that arose for consideration were (i) whether there was a contract of appointment ('the contract') between the plaintiffs and the second defendant, and if there was none, whether the second defendant was retained/appointed in any other way as a solicitor for the plaintiffs; (ii) whether the second defendant breached the contract by failing to carry out its professional duties; (iii) whether the second defendant was liable for the tort of negligence; and (iv) whether the plaintiffs were entitled to be paid for the loss and damage suffered.

Held (reducing second defendant's liability in relation to plaintiffs' claim by 50%):

(1) From cl. 6 of the asset agreement, it was clear that the second defendant was the agreed legal firm appointed by the plaintiff and the first defendant to act on behalf of the plaintiff in all relevant transactions regarding the sale and purchase of the properties. From what was produced in the Legal Services Agreement ('LSA'), the first defendant was the one who appointed the second defendant to provide all the legal services, including all the legal work and documentation required by the first defendant. Nowhere was it stated in the LSA that the second defendant was appointed by the plaintiffs for the property transactions in this suit. However, evidence adduced by the plaintiffs showed that the total purchase price of the two properties and total legal fees and disbursements were paid by the plaintiffs to the second defendant and bills and receipts were issued by the second defendant to the plaintiffs. The full purchase price of the two properties were deposited into the second defendant's client's account before the sales and purchase agreements ('SPAs') were executed. Thus, even though there was no written retainer, it could be

presumed or implied from the preponderance of evidence as shown by the conduct of the plaintiffs and the second defendant, that there was in actual fact a retainer of the second defendant by the plaintiffs for the sale and purchase of the two properties. (paras 12, 13, 15, 22 & 23)

(2) In view of the court's finding that there was no contract of appointment between the plaintiffs and the second defendant, there was no breach of contract or contractual obligations by the second defendant. However, based on the presumed or implied retainer, there was a solicitor and client relationship between the second defendant and the plaintiffs. Thus, it was without doubt that the second defendant owed the plaintiffs a duty of care in its discharge of its professional duties as a solicitor. The standard of care required of the second defendant was that of an ordinary competent solicitor using reasonable care and skill in the use of his special skills as a solicitor. From the evidence adduced by the plaintiffs, the second defendant was negligent in the exercise of its professional duties and responsibilities when he recklessly or failed or neglected to, *inter alia*, conduct proper searches on the land titles on which the said properties were erected on, and to take appropriate steps to transfer the said properties to the plaintiffs. Thus, the second defendant had failed in the exercise of his duty of care to the plaintiffs. (paras 24, 26, 27, 31 & 32)

(3) The second defendant had agreed with the first defendant, through the LSA, that it would provide all the necessary legal services to the first defendant for the first defendant's services to the first defendant's clients (including the plaintiffs). The second defendant, by receiving the full purchase price of the two properties and keeping it in its client's account, by attesting the SPAs and by issuing official bills and receipts to the plaintiffs, could not deny that it was not acting in the capacity of solicitor for its clients/the plaintiffs for the sale and purchase transactions. Hence, the second defendant was liable to the plaintiffs for the tort of negligence regarding the sale and purchase transactions of the two properties. (paras 39, 43 & 44)

(4) Even though the plaintiffs had obtained judgment in default against the first defendant, the plaintiffs were entitled to get judgment against the second defendant. The plaintiffs' claim against the first defendant was based on a different cause of action *ie*, for breach of the asset agreement and the services provided by the first defendant. The plaintiffs' claim against the second defendant was for the tort of negligence in the exercise of its duty of care as solicitor. Here, the liability of the first and second defendants were joint and several. Further, there was no proof that the plaintiffs had executed the judgment against the first defendant. For as long as such judgment was not executed, the plaintiffs were entitled to pursue the present claim against the second defendant. (para 45)

(5) The first plaintiff had entered the asset agreement mainly for profits to be made through the investment scheme operated by the first defendant. The plaintiffs had not taken the trouble to check up on the whole scheme or to meet the vendors or owners of the properties before paying the full purchase price and entering the SPAs. The plaintiffs had not signed any document directly with the second defendant to appoint them as solicitors but merely relied on the asset agreement and instructions from the first defendant. Even though the second defendant was not present to attest the second plaintiff's signature in the SPAs, the second plaintiff went ahead and signed the SPAs. The plaintiffs had not made the effort to meet and confirm with the second defendant regarding all the legal work and documentation to be done for the sale and purchase of the properties. Thus, there was contributory negligence by the plaintiffs and due to this, the liability of the second defendant in relation to the plaintiffs' claim for RM268,700 was to be reduced by 50%. (para 49)

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***

Choo Ah Kow v. Yeow Yew Thiam & Anor [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14 SC ***(refd)***

Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC ***(refd)***

Greaves v. Baynham Meikle [1975] 3 All ER 99 ***(refd)***

Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co [1978] 1 LNS 58 FC ***(refd)***

Hamizan Abd Hamid v. Wong Kok Keong & Anor [1994] 4 CLJ 122 HC ***(refd)***
Isaacs & Sons v. Salbstein [1916] 2 KB 139 ***(refd)***
Swamy v. Matthews & Anor [1967] 1 LNS 174 FC ***(refd)***
Taman Zahari Zabidi Sdn Bhd v. Adnan Sundra & Low & Anor [1990] 1 CLJ 891; [1990] 1 CLJ (Rep) 266 SC ***(refd)***
Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***

For the plaintiff - Christie Soosay Nathan (Tee Chor Wai with him); M/s Ong Kok Bin & Co
For the 2nd defendant - Rajinder Singh; M/s Rajinder & Goh

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam J:

Background

[1] This suit was heard in a joint trial with another suit, Civil Suit No: 22NCvC-1094-11/2011 ("the 1094 Suit") in view of similar causes of action against similar defendants, except for the fact that different plaintiffs and properties are involved in the two suits.

[2] This judgment is in respect of the present suit only.

Brief Facts

[3] On 28 January 2008, the first plaintiff executed an agreement ("the Asset Agreement") (CBOD1 Part B pp. 32 to 36) with the first defendant where, upon payment of an administrative fee, the first defendant was to render services ("the Services") to the first plaintiff for purchase, re-sale or rental of properties. In order to render the services, the first defendant shall, *inter alia*, source for auctioned properties at a guaranteed minimum rate of 30% below the market value and then make them available to the plaintiffs for such purpose.

[4] Pursuant to the asset agreement, the first plaintiff nominated his wife, the second plaintiff, as the nominee in the property transactions. The plaintiffs alleged that the second defendant was

appointed as their solicitor in the conduct of the transactions regarding the two properties ("the Properties") which they purchased, which are the subject matter of the claim in this action.

[5] The plaintiffs paid the total purchase price of RM268,700, which were kept in the second defendant's client's account for the properties, and total legal fees and disbursements of RM4,809.54 to the second defendant.

[6] Subsequently, the plaintiffs discovered that the properties did not belong to the purported vendors.

[7] Judgment in default was obtained by the plaintiffs against the first defendant on 12 October 2012.

[8] The plaintiffs are now suing the second defendant for loss and damage suffered by reason of the breach of his duties and responsibilities as their solicitor.

[9] The plaintiff's claim against the first and second defendants, as stated in the writ of summons and statement of claim, is for:

(a) the sum of RM268,700;

(b) the refund of RM4,809.54 being legal fees, stamp duties and disbursements from the second defendant;

(c) interest at the rate of 4% pa, on RM273,509.54 (RM268,700 plus RM4,809.54) from the date of filing of the writ of summons till the date of full settlement;

(d) costs of this action; and

(e) further relief as the court deems fit.

Issues

[10] The issues to be decided by the court are:

(i) whether there is a contract of appointment ("the contract") between the plaintiffs and the second defendant, and, if there is none, whether the second defendant was retained/appointed ("appointed") in any other way as a solicitor for the plaintiffs;

(ii) whether the second defendant breached the contract by failing to carry out its professional duties;

(iii) whether the second defendant is liable for the tort of negligence; and

(iv) whether the plaintiffs are entitled to be paid for the loss and damage suffered.

Whether There Is A Contract Of Appointment ("The Contract") Between The Plaintiffs And The Second Defendant, And, If There Is None, Whether The Second Defendant Was Appointed In Any Other Way As A Solicitor By The Plaintiffs

[11] The plaintiffs relied on cl. 6 of the asset agreement to show that the second defendant was appointed by the first plaintiff and the first defendant to act for the plaintiffs:

> 6. Agreed Legal Firm means that the Resident and AFSB hereby have agreed to appoint Messrs Jagmohan Singh & Associates or Messrs Bavani or any other legal firm appointed by AFSB to act on behalf of Resident on all the relevant transactions arising from this Terms and Conditions and such Sale and Purchase as so arising/connected under this Terms and Conditions.

[12] From the above cl. 6, it is clear that the second defendant/agreed legal firm was appointed by the plaintiff/resident and the first defendant/AFSB to act on behalf of the plaintiff/resident in all relevant transactions regarding the sale and purchase of the properties. However, as submitted by counsel for the second defendant, there is no privity of contract between the plaintiffs and the second defendant because the second defendant is not a party to the asset agreement which was executed between the first plaintiff and the first defendant. The second defendant has no contractual obligation to the plaintiffs under the asset agreement, and is not bound by it, since he is not a party to the agreement.

[13] Jagmohan Singh ("Jagmohan") (DW1), the sole proprietor of the second defendant, contended that the second defendant was only governed by the legal services agreement ("LSA") (CBOD2 Part C pp. 3 to 7) that he executed with the first defendant on 13 November 2006. I am of the view that the LSA, although it is a Part C document in CBOD1, can be admitted as an exhibit since the document was produced by Jagmohan (DW1) himself who had executed the agreement. Moreover, it is to be noted that a similar LSA for the 1094 Suit in CBOD6 Part C pp. 4 to 8

was produced and marked as exh. D59 on the request of counsel for the plaintiffs. Therefore, consistent with the admission of exh. D59 in the 1094 suit, the terms of the LSA in this suit can be considered.

[14] Clauses 1, 2 and 3 of the LSA provide:

> 1. It is hereby agreed that AFS shall strictly utilize the legal services of the firm of Jagmohan Singh & Associates (or assigned Legal Firm with the prior consent obtain from AFS) for all the legal services arising from the service provided by its establishment to the Individual members purchasing properties through the AFS establishment.
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> 2. AFS hereby agrees that all the legal work, documentation and other arising legal matters from the services provided in Malaysia and outside of Malaysia shall be utilizing the services of the firm of Jagmohan Singh & Associates or through the appointed affiliate offices of Jagmohan Singh & Associates. In consideration of the complete legal work and other related service being given by AFS to Jagmohan Singh & Associates (hereinafter referred to as the Legal Firm), Legal Firm shall provide the service of drafting agreements only strictly for AFS free of charge.
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> 3. Legal Firm hereby agrees to provide the Legal services to its Individual Purchaser for the purchasing of properties at the agreed Professional Fees (i.e. 1% of each individual purchase price) at a half discounted sum and the charges for disbursement shall be the normal chargeable legal rate charges of the country. The said fees shall be collected from the Individual Purchaser by the Legal Firm at the time of execution of the legal documents or other relevant documents prepared by the Legal Firm/Alseth Corporation (M) Sdn. Bhd.

[15] As contended by the second defendant, it can be seen clearly from the LSA that the first defendant is the one who appointed the second defendant to provide all the legal services, including all the legal work and documentation required by the first defendant. This is to enable the first defendant to provide the services to the "Individual Purchaser" which includes the plaintiffs. Nowhere is it stated in the LSA that the second defendant was appointed by the plaintiffs for the property transactions in this suit.

[16] Neither is it pleaded in the statement of claim that the plaintiffs appointed the second defendant as its solicitor. There is not a single document produced by the plaintiffs to prove such appointment.

[17] The question that arises is whether the second defendant was appointed by the plaintiffs as their solicitor in these sale and purchase transactions.

[18] In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460; [1989] 3 MLJ 434, the High Court held:

> There was no written retainer of the second defendant by the Plaintiff. But there is no legal requirement for retainers to be in writing - Corderey on *Solicitors* (7th Ed) at p. 50.

[19] In *Taman Zahari Zabidi Sdn Bhd v. Adnan Sundra & Low & Anor* [1990] 1 CLJ 891; [1990] 1 CLJ (Rep) 266; [1990] 1 MLJ 424 the Supreme Court held:

> There was no written retainer of the respondent by the appellant but a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them (Corderey on *Solicitors* (7th Ed) at p. 578).

[20] The second defendant submitted that the plaintiffs went into the Investment Scheme with the first defendant for making quick profit. The plaintiffs did not care and did not adhere to or comply with the SPAs themselves (see cl. 10 of SPA and paras. 48 to 50 of second defendant's main submissions). Throughout the dealings, the plaintiffs placed sole reliance on the first defendant to the exclusion of the second defendant. This can be shown, *inter alia*, in the following instances:

(i) The first plaintiff banked in a sum of RM88,700 into the second defendant's client's account, and wrote and informed only the first defendant of the payment (CBOD2 p. 193). The first plaintiff requested for a receipt only from the first defendant, and not the second defendant;

(ii) Clause 18 of the asset agreement provides that vacant possession was to be handed over by the first defendant to the plaintiffs (CBOD1 Part B p. 33) within 45 days of executing the SPA for the transaction that was obtained and secured by the first defendant for the plaintiffs.

The second defendant further submitted that the plaintiff did not at any time seek to specifically enforce the asset agreement of the SPA entered on 2 June 2009 (first property) and 22 June 2009 (second property). The sole reason was due to the fact that the plaintiffs were aware that the SPAs were mere instruments for the investment mechanism with the first defendant. Otherwise, if the plaintiffs were genuine purchasers, they would have requested for delivery of vacant possession in August 2009, but they did not do so;

(iii) The legal files on the SPAs were actually located in the office of the first defendant (CBOD2 Part C p. 33);

(iv) Through the first defendant's website information, road shows and letters to Residents (eg, CBOD1 Part B pp. 83, 88, 94 and 95), it was made clear by the first defendant to the Residents/Individual Purchasers, including the plaintiffs, that the first defendant would liase with the bank for completion of documents, and use Alseth, ie, the legal division of the first defendant, to conduct the necessary checks on all the properties, details and ownership etc; and

(v) The plaintiffs never met nor instructed the second defendant in any manner whatsoever.

[21] The second defendant contended that since it was not appointed by the plaintiffs as their solicitor, it does not owe any duty of care to the plaintiffs. The second defendant was appointed by the first defendant under the LSA, and it has fulfilled all its contractual obligations to the first defendant.

[22] However, the evidence adduced by the plaintiffs shows the following:

(i) The total purchase price of the two properties amounting to RM268,700 and total legal fees and disbursements of RM4,809.54 were paid by the plaintiffs to the second defendant, and bills and receipts were issued by the second defendant to the plaintiffs (exhs. CBOD5 Part B pp. 68, P18, P19, P20, P21, CBOD1 Part B pp. 80 and 81 and CBOD2 Part C p. 220).

(ii) Although there was no SPA prepared for the resale of the properties, the second defendant issued the bill and receipt for RM535 (CBOD1 Part B p. 93 and exh. P21).

(iii) The two SPAs for the first property in Gombak (CBOD1 pp. 70 to 79) and the second property in The Summit Subang (CBOD1 pp. 83 to 90) bear the name, address and contact numbers of the second defendant at the front page. The signatures of the second plaintiff and the purported vendors were attested by the second defendant.

(iv) The full purchase price of the two properties were deposited into the second defendant's client's account before the two SPAs were executed.

[23] The court finds that even though there is no written retainer, it can be presumed or implied from the preponderance of evidence as shown by the conduct of the plaintiffs and the second defendant, that there is in actual fact a retainer of the second defendant by the plaintiffs for the sale and purchase of the two properties. It is clear that the second defendant allowed its name to be used as the solicitor on record for the SPAs.

Whether The Second Defendant Breached The Contract By Failing To Carry Out Its Professional Duties

[24] In view of the earlier finding of the court that there is no contract of appointment or written retainer between the plaintiffs and the second defendant, there is no breach of contract or contractual obligations by the second defendant.

[25] However, based on the presumed or implied retainer, there is a solicitor and client relationship between the second defendant and the plaintiffs. The plaintiffs' claim is therefore dependent on their cause of action against the second defendant for the tort of negligence.

Whether The Second Defendant Is Liable For The Tort Of Negligence

[26] In *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751; [2009] 4 MLJ 183, Low Hop Bing JCA held:

> [27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:
>
> (1) the solicitor owes the client a duty of care;
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> (2) there is a breach of that duty by the solicitor;
>
> (3) the client has thereby suffered damage; and
>
> (4) the damage is not too remote a consequence of the breach.

Whether The Second Defendant Owes The Plaintiffs A Duty Of Care

[27] Since the court has found that a solicitor and client relationship exists between the second defendant and the plaintiffs, it is without doubt that the second defendant owes the plaintiffs a duty of care in its discharge of its professional duties as a solicitor.

Whether There Is A Breach Of The Duty Of Care By The Second Defendant As Solicitor

[28] The standard of care required of the second defendant is that of an ordinary competent solicitor using reasonable care and skill in the use of his special skill as a Solicitor (see Federal Court case, *Swamy v. Matthews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138, *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 and *Greaves v. Baynhem Meikle* [1975] 3 All ER 99 per Lord Denning).

[29] The question is whether the second defendant had breached that standard of care in the transactions regarding the two properties.

[30] The plaintiffs adduced the following evidence:

First Property:

The SPA is in CBOD1 Part B pp. 70-79. The plaintiffs are purchasers. The vendor is Hardeep Singh a/l Gurubakh Singh. The property is Unit No. 4-3-1, Jalan 4/50, Diamond Square, Off Jalan Gombak, 53300 Kuala Lumpur. The purchase price is RM88,700.

Joanne Chew Chin Lee (PW3) from the housing Developer, Medan Ehsan Sdn Bhd, confirmed that, based on their records, the Principal Purchasers of the first property are Seet Peng Hung and Loh Nyok Yan and the property was auctioned to Azaine bin Mohamed. The currrent beneficial owner of the property is Azaine bin Mohamed and not Hardep Singh a/l Gurubakh Singh who was named as the purported vendor in the SPA of the first property (exhs. P11, P12, P14 and P15).

Second Property:

The SPA is in CBOD1 Part B pp. 83 to 92. The plaintiffs are the purchasers. The vendor is Savendar Kaur a/p Charan Singh. The property is a shop lot known as Lot F1.85, 1st Floor, The Summit Subang, Persiaran Kewajipan, 47600 Subang Jaya, Selangor Darul Ehsan. The purchase price is RM180,000.

Serene Leong Pei Lee (PW1) from the Badan Pengurusan Bersama, The Summit Subang, confirmed that, based on their records, the current beneficial owner of the second property is Leong Yee Gang, and not Sarvender Kaur A/P Charan Singh who was named as the purported vendor in the second SPA. She produced another SPA dated 14 May 2009 (exh. P1) which is between Chai Hin Fook and Leong Yee Gang to establish the ownership of the second property as in exhs. P5 and P6.

Leong Yee Gang (PW2), the property owner, testified that he bought the second property by way of auction from Chai Hin Fook and he has charged the property to CIMB Islamic Bank Berhad.

[31] Pursuant to s. 10 of the First Schedule of the SPA, the second defendant has a duty to release the balance purchase price or full purchase price to the vendor only after having received the relevant confirmation from the developer that the vendor named in the SPA is in fact the owner of the property to be sold. There is no evidence that the second defendant obtained such confirmation from the developer. The plaintiffs have shown that the vendors stated in the SPAs are not the beneficial owners of the properties. DW1 admitted that the second defendant did receive the full purchase price of the properties under the SPAs. He admitted attesting the signatures in the SPAs. Therefore, it is clear that the second defendant was acting as a solicitor and as a stakeholder regarding the SPAs. The second defendant did not produce any documentary proof to show that it had made any payment or full payment of the purchase price to the vendors. Neither did the second defendant show any letters from Alseth instructing the second defendant to release the purchase price of the properties to the vendors.

[32] From the evidence adduced by the first plaintiff and the other plaintiffs' witnesses, it is clear that the second defendant failed in the exercise of his duty of care to the plaintiffs. The second defendant was negligent in the exercise of its professional duties and responsibilities as solicitor in the manner as pleaded by the plaintiffs, in para. 14 of the statement of claim ie, he recklessly and/or failed or neglected to:

(a) conduct proper searchers on the land titles on which the Said Properties are erected on;

(b) peruse, check and/or verify, and seek confirmation on the rightful ownership of the Said Properties;

(c) communicate with all relevant parties/authorities for the relevant consents and/or approvals for transfers/assignments of the Said Properties upon their issuance of separate individual titles (as appropriate);

(d) inform/communicate with the relevant authorities, developers and or proprietors on the sales/purchase of the Said Properties;

(e) take all such appropriate steps to transfer/assign the Said Properties or any of them to the Plaintiffs;

(f) account for the aforesaid total purchase price or the aforesaid total sale proceeds in relation to the said Properties;

(g) hold as stakeholders the purchase price and effect payments of the same in accordance with the terms and conditions of the respective sales and purchase agreements relating to the Said Properties;

(h) conduct his duties and responsibilities in accordance with the terms and conditions of the sales and purchase agreements relating to the Said Properties;

(i) And carry out its duties and responsibilities that are required and or expected from that of a firm of Solicitor in the conduct of the property transactions; and

(j) in the exercise of any or all of the abovesaid duties and responsibilities.

[33] The second defendant contended that they were never appointed by the plaintiffs as solicitor to act for them and that the transactions here were not in the normal conveyancing practice. The conduct of the plaintiffs show that the sales and purchase transactions were done under the Investment Scheme of the first defendant according to the asset agreement. The plaintiffs paid the first defendant the sum of RM47,050 (para. 5.1, statement of claim) as an initial administrative fee on the basis that the first defendant would source for properties and sell properties on behalf of the plaintiffs. The first plaintiff admitted to the presence of a risk in dealing with these transactions.

[34] The second defendant pointed out that the first plaintiff, under cross-examination, admitted to the following:

(a) the first plaintiff signed the asset agreement with the first defendant at the first defendant's office. The sole proprietor of the second defendant (DW1) was not present;

(b) the agreement was not executed by the second defendant;

(c) the two properties were offered by the first defendant and the plaintiffs confirmed the purchases with the first defendant, and not the second defendant;

(d) the plaintiffs went to the first defendant's office, instead of the second defendant's office, to execute the SPAs;

(e) the plaintiffs have never met and communicated with the second defendant; and

(f) the first plaintiff had admitted to attending the road shows organised by the first defendant to promote their business and services wherein the first plaintiff was informed regarding the preparation of the legal documents of their investment being done by Alseth (as confirmed by Nallini, DW3) (see eg, the first defendant's letter dated 9 April 2007 in CBOD2 Part C pp. 24 and 25 to Jagmohan/DW1, who himself is also an investor in the same Investment Scheme, where DW1 was notified, just like any other Resident/Purchaser, that the legal documentation would all be done by Alseth).

[35] The second defendant relied on the evidence of DW2, Pathmanathan a/l K Rajaratnam, the former employee and legal executive of the first defendant, who stated that all the searches and legal documentation, including the SPAs and deeds of assignment for the first defendant's members of the Investment Scheme, including the plaintiffs, were carried out by Alseth, the legal division of the first defendant, and not by the second defendant. DW2 further stated that all times the staff of the first defendant or Alseth attended to the execution of the documentation by all parties and to the stamping of the documents. Collection of the SPAs was done at Alseth's office in Wisma Pantai.

[36] It is true that the plaintiffs purchased the two properties based on the asset agreement with the first defendant mainly for investment and resale, and the transactions were not executed according to normal conveyancing practice. From the provisions of the asset agreement and the LSA, and the evidence adduced, it is clear that the first defendant, through its President, Director, shareholder and mastermind, Paramjit Singh a/l Charan Singh, was the main player in the whole Investment Scheme. The first defendant was the one dealing with the plaintiffs and the one giving instructions to the second defendant and/or Alseth, as the case may be.

[37] It is also obvious that the plaintiffs are now pursuing the claim against the second defendant to recover their losses since the first defendant has shut down its operation.

[38] The undeniable fact here is that the second defendant had agreed with the first defendant, through the LSA, that it would provide all the necessary legal services to the first defendant for the first defendant's services to the first defendant's clients/residents (including the plaintiffs), with assistance from Alseth (see cls. 1, 2, 3, 3.1 and 3.2, and 7 of the LSA in CBOD2 Part C pp. 3 to 7).

[39] The second defendant, by receiving the full purchase price of the two properties and keeping it in its client's account, by attesting the SPAs, and by issuing official bills and receipts to the plaintiffs cannot deny that it was not acting in the capacity of solicitor for its clients/the plaintiffs for the sale and purchase transactions.

[40] The second defendant contended that it was not a stakeholder for the full purchase price since the plaintiffs paid the sum even before the SPAs were signed. In my opinion, it is immaterial that the sum was paid before, and not after, the SPAs were signed. What is important here is that the second defendant willingly accepted the sum and kept it in its client's account. The second defendant made no protest about it, and therefore cannot now deny that it was acting as stakeholder for the monies paid.

[41] Even though the transactions herein are part of the plaintiffs' participation in the Investment Scheme pursuant to the asset agreement, the fact remains that when the properties are to be purchased by the plaintiffs, the second defendant has a duty to conduct the necessary searches regarding the properties in order to ensure that the plaintiffs are purchasing the properties from the true owners and that the plaintiffs will be guaranteed the beneficial ownership, and finally the legal ownership, of such properties.

[42] The second defendant contended that the necessary searches to be made, the SPAs, and all the legal documentation were not done by him but by the first defendant and Alseth. The court finds that the second defendant, *vide* the LSA, had agreed to appoint Alseth to assist the second defendant in all the legal documentation etc. regarding the transactions for the properties. This can be clearly seen in cls. 3.1 and 3.2 and 4 of the LSA:

> 3.1 Legal Firm hereby agrees to solely appoint the company known as Alseth Corporation (M) Sdn Bhd as the sole provider for all the back end resource and support on the preparation of the necessaries legal documentation, land searches, secretarial service collection of documents, liaising with AFS's clients (first party), issuance of letters, phone and fax calls for all the work arising from the agreement entered between the first party and AFS under the said agreement.
>
> 3.2 Therefore based on Alseth Corporation (M) Sdn Bhd continuous support to the Legal Firm on the preparation of documents and incidentals on the above matter, the Legal Firm hereby agrees to pay the services of Alseth Corporation (M) Sdn Bhd in the following manner ie, the receipt of the Discounted Legal Fees and disbursement shall be paid in the following proportion between both parties:

	Alseth Corporation (M) Sdn Bhd	Legal Firm
First Year	70%	30%
2nd - 3rd Year	65%	35%
4th - 5th Year	60%	40%
Fifth Year onwards	55%	45%

All the costing for the receipts book printed for the Legal Firm shall be borne by both parties according to the receipt of the proportion of the Discounted Legal fees and Disbursement. Taxes chargeable on the Legal Firm shall be paid in proportion of both parties as stated above inclusive of the discounted sum herein.

4. Alseth Corporation (M) Sdn Bhd and Legal Firm shall share the sum in equal proportion for the sum that is received under the aborted charges. Alseth Corporation (M) Sdn Bhd hereby agrees to appoint 2 staffs to assists the Legal Firm in preparing the legal documents, other incidentals documents and to do the necessaries as stated at Clause 3.1. The salary and expenses of the staffs shall be solely borne by Alseth Corporation (M) Sdn Bhd.

[43] Both the first defendant and Alseth are companies incorporated under the Companies Act 1965, and not legal firms which operate with a practising certificate issued under the Legal Profession Act 1976 ("LPA"). In fact, the sharing of legal fees between the second defendant, a legal firm, and Alseth, a company, as provided in cl. 3.2 of the LSA is not allowed under the LPA and the Solicitors' Remuneration Order 2005, but that is not the subject matter of this suit. What is important here is that, out of the three parties involved ie, the first defendant, the second defendant and Alseth, only the second defendant is practising as a legal firm and it is clear proof that the second defendant, when attesting the relevant signatures of the parties in the SPAs, was holding itself out as the solicitor on record for the plaintiffs. This is further fortified by the official bills and receipts issued by him for the sale and purchase transactions of the two properties. The bill for legal fees and disbursements which the second defendant

issued to the plaintiffs states very clearly the second defendant's professional charges for performing work which is normally done by a solicitor for a sale and purchase transaction:

> TO OUR PROFESSIONAL CHARGES for acting for you in respect of the above matter; inclusive of perusal, correspondence, preparing Sale and Purchase Agreement and Deed of Assignment; to our attestation of the said Agreements; to our attending to the stamping, completing the matters and to all other attendances not specifically set forth herein:

[44] Based on the totality of the evidence adduced, the court is satisfied that the second defendant is liable to the plaintiffs for the tort of negligence regarding the sale and purchase transactions of the two properties.

Whether The Plaintiffs Are Entitled To Be Paid For The Loss And Damage Suffered

(a) Joint And Several Liability

[45] Even though the plaintiffs have obtained judgment in default against the first defendant, the plaintiffs are entitled to get judgment against the second defendant for the following reasons:

(i) the plaintiffs' claim against the first defendant is based on a different cause of action ie, for breach of the asset agreement and the services provided by the first defendant.

The plaintiffs' claim against the second defendant is for the tort of negligence in the exercise of its duty of care as solicitor.

Here, the liability of the first and second defendants are joint and several. The discharge of liability by one does not discharge the liability by the other. Where there are two different causes of action, the liability can be several (see *Choo Ah Kow v. Yeow Yew Thiam & Anor* [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14, Supreme Court, at p. 15, and *Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co* [1978] 1 LNS 58; [1978] 2 MLJ 101, Federal Court, at p. 104); and

(ii) there is no proof that the plaintiffs have executed the judgment against the first defendant. For as long as such judgment is not executed, the plaintiffs are entitled to pursue the present claim against the second defendant.

[46] In *Hagemeyer Trading* (*supra*), the Federal Court referred to Swinden Eady LJ in *Isaacs & Sons v. Salbstein* [1916] 2 KB 139 who held that where the obligation binds two or more persons severally, a judgment against one is no bar to an action against the other. Swinden Eady LJ quoted Bayley B in *Lechmere v. Fletcher Cr & M* at p. 635, who laid down the principle relating to the doctrine of election and joint and several liability:

> There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied: but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one.

(b) Extent Of The Second Defendant's Liability

Contributory Negligence By The Plaintiffs

[47] The second defendant raised the issue of contributory negligence as a defence. However, counsel for the plaintiffs relied on the decision of James Foong J (as he then was) in *Hamizan Abd Hamid v. Wong Kok Keong & Anor* [1994] 4 CLJ 122 at p. 124 and submitted that "contributory negligence is still required to be pleaded by the defendant, and failure to do so is fatal to the defence even though contributory negligence on the part of the plaintiff is found to exist."

[48] With respect, I do not agree that contributory negligence has to be pleaded by the second defendant here. The issue before this court is whether the second defendant is negligent and, if so, to what extent. If, in the course of evaluating the evidence, the court finds that there is negligence on the part of the second defendant, but also finds that there is contributory negligence on the part of the plaintiffs, then in assessing the quantum of damages to be paid to the plaintiffs, it would be grossly unjust and wrong for the court to close its eyes to such contributory negligence and award damages based on a 100% liability. I am of the firm view that any contributory negligence by the plaintiffs must be considered.

[49] The court finds that there is contributory negligence by the plaintiffs. It is clear from the evidence adduced that the first plaintiff entered the asset agreement mainly for profits to be made through the Investment Scheme operated by the first defendant through Paramjit Singh a/l Charam Singh. The plaintiffs never took the trouble to check up on the whole scheme or to meet the vendors or owners of the two properties before paying the full purchase price and entering the SPAs. The plaintiffs knew that they did not sign any document directly with the second defendant to appoint the second defendant as solicitors but merely relied on the asset agreement and instructions from the first defendant. Even though the second defendant was not present to attest the second plaintiff's signature in the SPAs, the second plaintiff went ahead and signed the SPAs. The plaintiffs were not concerned over the fact that they signed the SPAs at the first defendant's office, and not at the second defendant's office, in the absence of the second defendant who was to attest the signatures of the parties in the SPAs. The plaintiffs never even applied their minds to think that they have to meet and confirm with the second defendant/jagmohan regarding all the legal work and documentation to be done for the sale and purchase of the two properties, and thereafter the resale of such properties.

[50] Due to the contributory negligence by the plaintiffs, I am of the opinion that the liability of the second defendant in relation to the plaintiffs' claim for RM268,700 is to be reduced by 50%. From the totality of the evidence adduced, it is clear that the first defendant is more blameworthy than the second defendant. However, that does not relieve the second defendant from liability to the plaintiffs.

Decision

[51] Based on the above considerations, the plaintiffs' claim against the second defendant is allowed as follows:

(a) The sum of RM268,700 less 50% for contributory negligence of the plaintiffs;

(b) The refund of RM4,809.54 being legal fees, stamp duties and disbursements from the second defendant;

A (c) Interest on the sums in (a) and (b) above at 4% per annum from the date of filing of the writ of summons till the date of judgment and at 5% per annum from the date of judgment till the date of full settlement; and

B (d) costs of RM8,000.

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